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Supreme Court of the United States.

OCTOBER TERM, 1900.

Filed Oct. 27, 1900.

No. 305.

CHARLES W. LYNDE,
Plaintiff in Error,
vs.
MARY W. LYNDE.

No. 369.

MARY W. LYNDE,
Plaintiff in Error,
vs.
CHARLES W. LYNDE.

Brief for Mary W. Lynde, Defendant and Plaintiff in Error.

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In the Supreme Court of the United States.

OCTOBER TERM, 1900.

CHARLES W. LYNDE, Plaintiff in Error, AGAINST MARY W. LYNDE, Defendant in Error.	No. 305.
MARY W. LYNDE, Plaintiff in Error, AGAINST CHARLES W. LYNDE, Defendant in Error.	No. 369.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

Brief for Mary W. Lynde.

These are cross-writs of error to review a judgment of the Court of Appeals of the State of New York which affirmed an order of the Appellate Division for the Second Department (Record, pp. 110 and 107). Said order of the Appellate Division modifies the judgment of the Special Term entered in the office of the

Clerk of Suffolk County, *so as to adjudge that Mary W. Lynde is entitled to no equitable relief, to no future alimony, and to only $8,840 back alimony and $553.38 costs.* As modified, the Special Term judgment is affirmed.

This Special Term judgment adjudges that a decree for alimony, with the order providing for its enforcement, rendered against Charles W. Lynde by the Court of Chancery of New Jersey in an action between the parties hereto, be enforced against him with like effect in New York as if the same were a judgment of the New York Court. *It adjudges that Charles W. Lynde pay Mary W. Lynde the amount of alimony due to its date, $14,084.65, with $811.38 costs and allowance; directs him to pay alimony in future at $80 per week, the rate prescribed by the New Jersey decree, and to give bond to secure those payments; and, in case he fails to comply with said provisions, appoints a Receiver, ancillary to the New Jersey Receiver, of sufficient of his property to insure the payments directed* (Record, fols. 163–165).

Mary W. Lynde seeks to review the judgment as modified by the Court of Appeals, on the ground that it does not give full faith and credit to the decree of the Court of Chancery of New Jersey.

Charles W. Lynde seeks for an absolute reversal of the judgment on the ground that it deprives him of his property without due process of law, *although he never raised this nor any other Federal question in the New York Courts, as will be seen by the record.*

Statement of Facts.

This action was brought to enforce a decree of the Court of Chancery of New Jersey, *decreeing the payment to Mrs. Lynde of $8,976.07 back alimony and costs to the date of said decree, and $80 a week from December 28th, 1897, as future alimony, and directing Lynde*

to give bond to secure such payments, together with an order of said Court duly made pursuant to said decree, appointing a Receiver of his property and enjoining him from disposing of his property within the jurisdiction of said Court. This action was made necessary by his having removed himself and his property from New Jersey to New York, so evading the operation of so much of the decree as awarded alimony and sequestration, while taking advantage of the divorce by marrying again. It is not an action for alimony. The question of alimony has been decided by the Court of Chancery of New Jersey, a Court of competent jurisdiction.

It should be noted that the following facts are set up in the complaint, and are not denied by the answer (seeComplaint, Record, pp. 2–8; Answer, pp. 56, 57.)

The parties hereto were married in New Jersey, and lived together in New Jersey for about four years. In November, 1892, *while both parties were still domiciled in New Jersey*, Mary W. Lynde filed a petition in Chancery in New Jersey, praying for a divorce and alimony. Charles W. Lynde was not served personally at that time, nor did he then appear in the action. Upon substituted service, properly made, such proceedings were had that on August 7th, 1893, a final decree was made divorcing her from him (Record, pp. 60, 2, 3; Orig., 4, 5; 56, 57; Orig. 107–8; 9–11).

In such cases it is the usual practice in Chancery of New Jersey, in the final decree, to reserve the question of alimony for decision upon a future application (Record, pp. 60, 3, 56, 57). Through the inadvertence of Mrs. Lynde's solicitor, however, without her knowledge and in spite of her instructions, a decree was entered which made no provision for alimony, and did not reserve the question for future consideration (Record, pp. 60, 3, 56, 57).

In 1894 Charles W. Lynde's father died, leaving a large estate. Under his father's will he received

during 1895 and 1896 over $500,000 (Record, pp. 60, 3, 56, 57).

On February 11, 1896, Mrs. Lynde filed a petition and affidavits praying that said decree be opened and amended "*by decreeing that reasonable alimony be paid to her by the defendant,*" *and for other relief* (Record, pp. 61, 62; original, 115, 117; 3, 4, 12; orig., 22, 23).

Upon said petition an order was made directing Lynde to show cause on February 24th, 1896, why the prayer of said petition should not be granted. Certified copies of said petition, affidavits and order were duly personally served upon him (Record, pp. 61, 4, 17, 56, 57).

On said February 24th, 1896, Charles W. Lynde appeared generally by his attorney, J. Herbert Potts, Esq., and opposed petitioner's application on the law and the facts. He filed affidavits denying the facts alleged in the petition (Record, pp. 61, 62, 4, 57, 80; original, 115–118, 7, 107, 108, 147). *Throughout all subsequent proceedings Mr. Potts acted as general solicitor for him. No pretense was ever made that his appearance was not general* (Record, pp. 62, 38, 39, 40–45, 95; original, 117, 118, 70, 73, 74, 83, 173).

On October 27, 1896, the Chancellor, after hearing arguments and proofs on behalf of both parties, made an order amending the decree of divorce by inserting the usual clause providing that Mrs. Lynde should have the right to apply at the foot of the decree for alimony, reserving the right to pass upon the allowance or refusal of alimony and its amount (Record, pp. 61, 37; original, 115, 69; 54 N. J. Equity, 473).

Notice of motion for a reference as to the amount of alimony was immediately served on Lynde's said solicitor. Said motion was adjourned one week at his request, and thereafter fully argued on behalf of both parties (Record, pp. 61, 5, 6; original, 116, 10).

Lynde appealed from said order of October 27, 1896, to the Court of Errors and Appeals (Record, pp. 61, 5) and decision on the motion for a reference was re-

served, at his request, pending said appeal (Record, pp. 6, 47). The Court of Errors and Appeals unanimously affirmed the order appealed from, 55 N. J. Eq., 591 (Record, pp. 61, 5, 45), and thereupon an order was made referring to a Master the question as to the amount of alimony. This order was expressly based on the petition and order to show cause *and Lynde's appearance in February, 1896* (Record, pp. 61, 46, 47). The reference proceeded on due notice to his solicitor (Record, pp. 61, 6), and testimony was taken before the Master during July, 1897 (Ex. "N," Record, p. 47).

On September 7th, 1897, pursuant to a notice of motion for a commission to examine witnesses in New York, Lynde's solicitor appeared before the Chancellor and stated, for the first time, that he was no longer his solicitor. The Chancellor thereupon made an order (Deft.'s Ex. No. 2, Record, p. 98), which recited that "the annexed notice of motion * * * was duly served on J. Herbert Potts, Esq., as solicitor for defendant;" that said Potts "appeared and stated in open court that he is no longer solicitor of defendant," *and thereupon denied the motion with leave to renew "on personal service of notice thereof upon the defendant, either within or without the State." It should be noted that this was merely a motion for a commission to examine witnesses in New York.* The reference to the Master was made some time before this.

Personal service was accordingly made on Lynde thereafter (Record, p. 99), and in the subsequent proceedings Mr. Potts did not appear, though notified (Record, pp. 61, 62). No order that the cause proceed *ex parte* was ever made, *and Lynde received actual notice of all subsequent proceedings* (Record, pp. 77, 82, 49–54, 5–7).

In addition to personal service of notices upon him, all papers were posted in accordance with the chancery rules (Record, pp. 6, 7, 53, 54). After the Master's report was filed, it, with a *rule nisi* to confirm

it, was served on him, together with a notice of motion for a final decree (Record, pp. 6, 7, 49, 51; original, 93, 94, 97). On December 28th, 1897, a final decree was entered, reciting not merely the posting and substituted service, under the rules, of the report, rule *nisi* and notice, but that they were actually "*duly served upon the defendant*" (Record, pp. 50–53, especially p. 51; original, 97).

This is the decree to enforce which the New York action was brought (Record, pp. 50–53). Pursuant to said decree, and again on actual service of notice on Lynde, an order was made (Record, pp. 53–55, 7), appointing a Receiver of his property and enjoining him and his agents from disposing thereof (Record, pp. 55, 56). It was also sought to enforce this order in the New York action.

It became impossible to get anything through the medium of this receivership, and no part of the sum due has been paid (Record, pp. 8, 62).

Mrs. Lynde has no means of support other than her own exertions. Lynde possesses over $500,000 (Record, pp. 61, 3, 48, 52).

Lynde has married again since the application to amend the decree in Chancery of New Jersey (Record, pp. 83, 41).

The New York action to enforce this New Jersey decree was tried before Mr. Justice SMITH.

After this trial at Special Term, Mr. Justice SMITH handed down a decision, in which he granted to Mrs. Lynde all the relief given to her in New Jersey, as above set forth (Record, pp. 70, 71).

The decision of the Special Term was signed January 17th, 1899 (Record, pp. 58–63). The judgment was entered January 21st, 1899 (Record, pp. 63–65).

Lynde filed his exceptions and appealed to the Appellate Division from said judgment January 25th, 1899 (Record, pp. 66–69). The Appellate Division modified Justice SMITH's judgment as above set forth.

The opinion of the Appellate Division (41 App. Div., 280) was filed June 6th, 1899 (Record, pp. 100–107), the order was signed the same day (Record, pp. 107, 108) and judgment was entered June 16th, 1899 (Record, p. 108).

Both parties then appealed to the Court of Appeals (Record, p. 109), which on April 6, 1900, affirmed the order of the Appellate Division (Record, p. 110). The judgment on the remittitur is printed at page 121 of the record. The opinion of the Court of Appeals is printed at pages 111-120 of the record.

Both parties then obtained writs of error from this Court to review the New York judgment (Record, pp. 122, 129).

Specification of Errors.

1. The Supreme Court of the State of New York, on the affirmance and direction of the Court of Appeals of said State, erroneously disregarded and held for naught the binding force of the decree of the Court of Chancery of the State of New Jersey in favor of Mary W. Lynde against Charles W. Lynde, which judgment was obtained upon due appearance in court on behalf of said Charles W. Lynde, and after jurisdiction duly obtained of the person of said Charles W. Lynde and of the subject matter of the suit.

2. The said Supreme Court and Court of Appeals erroneously failed to give such faith and credit to said decree of the Court of Chancery of New Jersey as the said decree has by law or usage in the courts of that State, contrary to the mandate of the Constitution of the United States in that behalf.

3. The Court of Appeals of the State of New York erred in affirming the order of the Appellate Division of the Supreme Court for the Second Department of

said State, and in not affirming the judgment of the Special Term of said Supreme Court.

4. The Appellate Division of the Supreme Court of New York for the Second Department erred in modifying the judgment of the Special Term of said Court, and in not affirming the same.

5. The Court of Appeals and the Appellate Division erred in not deciding that the decree of the Court of Chancery of New Jersey for alimony, counsel fee and costs, directing the defendant therein to give bond, appointing a Receiver of his property and sequestrating the same, which decree of the Court of Chancery was valid and enforceable against Charles W. Lynde personally in said State of New Jersey, was equally valid in the State of New York, and enforceable against him in said State in the same manner, to the same extent and with the like equitable relief.

6. The Court of Appeals and the Appellate Division erred in reducing the amount of the money judgment granted by the Special Term of said Supreme Court of the State of New York.

ARGUMENT.

FIRST POINT.

This Court should dismiss the writ of error obtained by Charles W. Lynde for want of jurisdiction.

The "title, right, privilege or immunity claimed under the Constitution" must be specially set up in the State Court. The intention to invoke the right

must be declared in some unmistakable manner. This Charles W. Lynde, the defendant in the courts below, did not attempt to do.

Oxley Stave Company vs. Butler County, 166 U. S., 648.
Dewey vs. Des Moines, 173 U. S., 193, 198.
Muse vs. Arlington Hotel Co., 168 U. S., 430, 435, 436.
Brooks vs. Missouri, 124 U. S., 394, 395.

In connection with the latter case, a reference to the third separate defense in defendant's answer (Record, p. 57) will disclose the fact that he expressly omits all mention of the Constitution of the United States as in any way relied on by him.

The only two rights under the Constitution which could have been involved in the New York courts were:

(1) *Was full faith and credit given to the decree of the Court of Chancery of New Jersey in favor of Mrs. Lynde?*

(2) *Was Mr. Lynde deprived of his property without due process of law?*

The first of these questions was specially set up by the plaintiff in the Supreme Court of the State of New York. It was the foundation of her cause of action. She won in the State courts, but she might with reason claim that the "decision" of the Court of Appeals was "against the right," in that it did not give to the New Jersey decree the same force and effect which it has by law and usage in the State where rendered. This right was invoked, however, by the plaintiff, and not by the defendant. *Mrs. Lynde alone is aggrieved by the decision of the Court of Appeals, and she alone can review that decision here.*

Missouri vs. Andriano, 138 U. S., 496.

The second of these rights was not specially set up in the courts of the State of New York, and therefore the

Supreme Court of the United States is without jurisdiction to re-examine the final judgment of said courts. An examination of the record in the State Court will disclose the fact that nowhere in the pleadings, on the trial, in the decision, or in the opinions of the Special Term, Appellate Division or the Court of Appeals was any Federal question raised or discussed other than the "full faith and credit" clause of the Constitution, raised by Mrs. Lynde.

It has been held that the United States Supreme Court will dismiss a writ of error to a State Court for want of jurisdiction, if it appears that no Federal question was raised on the trial of the case, but that it was made for the first time in the Appellate Court of the State.

Sugg vs. Thornton, 132 U. S., 524.

Neither the petition for a writ of error, the certificate of the Chief Judge of the State, nor the arguments of counsel in the State Court, can be resorted to for the purpose of showing that a Federal question was raised in the State Court.

Sayward vs. Denny, 158 U. S., 180, 183.
Butler vs. Gage, 138 U. S., 52.

Furthermore, even if a claim of right under the Constitution had been made, it is nevertheless clear that the decision complained of was so clearly right as not to require argument. The writ should therefore be dismissed.

Twitchell vs. Commonwealth, 7 Wallace, 324.
Spies vs. Illinois, 123 U. S., 131, 143 (164).
Brooks vs. Missouri, 124 U. S., 394.
Re Kemmler, 136 U. S., 436, 438.

It needs no argument to prove that upon the facts found by the State Court (Record, pp. 61, 62), as set forth below under the Second Point, the decision, so far as it is now brought in question by Mr. Lynde, was clearly right. *If Charles W. Lynde appeared generally*

in the New Jersey action, and opposed the application which resulted in the very decree enforced in the New York action, he has not been denied due process of law in either State.

In New York he was served with a summons and complaint in the State, appeared by an attorney, answered the complaint, was represented by counsel on the trial, and appealed to the Appellate Division and finally to the Court of Appeals. Certainly the New York Courts have not denied him due process of law. He not only had an opportunity to be heard, but he was heard. It would be absurd to ask the Supreme Court of the United States, even if he had properly raised the point so as to give it jurisdiction, to review the New York judgment by writ of error on this ground.

If he deemed himself aggrieved by the New Jersey decree, he should have attempted to obtain a writ of error to the court of last resort of that State within two years from the rendition of the decree complained of.

SECOND POINT.

This Court must accept and cannot review the findings of fact of the Special Term. These find conclusively that Lynde appeared generally in the New Jersey action, and that the Court of Chancery had jurisdiction both of the subject matter and of the person of the defendant.

On error to a State Court, in both law and equity cases, where the facts are found by the Court below,

the Supreme Court of the United States is concluded by such findings.

Egan vs. Hart, 165 U. S., 188, 191.
Dower vs. Richards, 151 U. S., 658.

This Court has no jurisdiction to review a decision of a State Court upon a pure question of fact, although a Federal question would or would not be presented according to the way in which the question of fact was decided.

Dower vs. Richards, *supra*, p. 668.

In the case of Lynde vs. Lynde the Special Term in New York found as facts, among others, the following: "*That the defendant appeared generally to oppose the said application by his solicitor, J. Herbert Potts. That said Potts was duly authorized by said defendant to appear for him in manner and form as he did appear*" (see Finding IX., Record, p. 61; original, p. 115).

"That the prayer of the petition to amend the decree of divorce, on which all subsequent proceedings in said cause were based, was that said decree should be amended and alimony awarded, and for such other relief as should be equitable and just (see Finding XII., Record, p. 62; original, p. 117).

"That, in obedience to the order to show cause why the prayer of the petition should not be granted, *the defendant appeared generally and submitted to the jurisdiction of the Court. That defendant did not object to the validity of the decree of divorce, but recognized its validity by remarrying. That, upon the return of said order to show cause, defendant did not object to the jurisdiction of the Court to entertain the application, but that he appealed to that jurisdiction to deny the said application upon the merits. That the said application was broad enough to include not only the amendment of the decree of divorce, but also the proceedings to make the amendment effective, and that the jurisdiction which the Court of Chancery obtained over defendant could not there-*

after be divested by the defendant. That the Court of Chancery of New Jersey had jurisdiction of the subject matter of said action and of the person of said defendant, and said Court had power to make the said decree for alimony, costs and counsel fee, and the said order to enforce said decree and make it effective, and that said decree and order are valid in the State of New Jersey and binding upon the defendant personally in said State" (see Finding XII., pp. 62 and 63; original pages 117 and 118).

These findings of fact have been approved both by the Appellate Division and by the Court of Appeals, and cannot be questioned in the Supreme Court of the United States.

If these findings of fact are binding on this Court, then there is no question as to the validity of the New Jersey decree. The only question is: How far should the New York courts enforce it?

THIRD POINT.

The evidence at the trial makes the New Jersey Court's jurisdiction still clearer. It shows that the decree and order sued on were duly made, and are binding on Charles W. Lynde personally in that State.

(a) Mr. Lynde's solicitor appeared generally on the application for alimony, and he was authorized to do so.

See Lynde vs. Lynde, 54 N. J. Eq., 473; affirmed, 55 N. J. Eq., 591.

An inspection of the record in the New Jersey Court of Chancery will show conclusively that Mr. Potts'

appearance was a general one. *At page 18 the Chancellor in his memorandum speaks of J. Herbert Potts "for the defendant;" at page 18 his name appears as "solicitor for defendant;" at pages 19 and 21 Mr. Potts cross-examines; at pages 24 and 30 he signs notices of motion on behalf of defendant, and at page 25 he conducts the direct examination of witnesses on behalf of defendant.* These are but a few instances of the many acts of Mr. Potts as defendant's solicitor. Others may be found at pages 30, 34, 37, 38, 39, 40, 43, 44, 45, 46 and 95.

No suggestion was made in the pleadings or on the trial that Mr. Potts exceeded his instructions in appearing as he did. Indeed, the reverse was expressly testified to by Mr. Potts himself (Record, pp. 76, 77, 79, 80), *who stated that he was retained for the purpose of preventing the opening of the decree of divorce "and the granting of alimony"* (Record, pp. 79, 80, 81).

Said Chancery record shows further that the defendant's solicitor not only opposed the opening of said decree, *but filed affidavits so drawn as to influence the Chancellor either to refuse alimony altogether or to award a very small sum (see Plaintiff's Exhibit 2, offered at p. 80; Record, pp.* 95, 41, 42).

These affidavits would have been absolutely immaterial if defendant's opposition had been confined to the mere opening of the decree.

Furthermore, defendant's attorney stipulated at the trial that the opposition to the application to amend that decree was partly based "on the ground that his [defendant's] estate was not as was claimed by the plaintiff" (Record, p. 79).

Drawing and filing affidavits is the usual method, under the practice in Chancery of New Jersey, of appearing and bringing on the hearing upon applications of this nature.

Crane vs. Brigham, 3 Stock. Ch. (N. J.), 29.

Having thus appeared generally, Mr. Potts never

entered an order directing that he cease to be such solicitor, although, as he admitted, that is the proper practice (Record, pp. 80, 81).

There is no question of the necessity of obtaining an order for this purpose.

> Dickinson's Chancery Precedents (N. J.), p. 281, (2) citing 1 Dan. Ch. Pr., 454, and Braithwaite, 564.

We have seen that due notice of the motion for a reference as to the amount of alimony was served upon Mr. Potts (Record, p. 47), and that he appeared on said motion on November 2d, 1896, and afterwards. The testimony offered by defendant shows that he was authorized to do so (Record, pp. 76, 79). It was not until long after this, in March, 1897, that defendant sought to limit Mr. Potts' authority to act for him (Record, p. 97), and it was not *until about September 7th, 1897*, that Mr. Potts stated that he had ceased to act as defendant's solicitor (Record, p. 98).

The defendant seeks to avoid the consequences of these acts of his solicitor in two ways, which may be properly taken up and disposed of now:

(1) He suggests that the appearance, though in form general and unlimited, should not be construed as a general appearance, because there is no such thing in New Jersey as a special appearance. The defendant's witness Mr. Potts testified on direct examination as follows:

"Q. Now, Mr. Potts, in your practice in New Jersey, is there such a thing as a special appearance?

"A. I never heard of such a thing.

"Q. I mean for special purposes? A. I never heard of it in that State" (p. 79).

This statement is not only contradicted by the statement of the same witness that he did not know whether he put on record the fact that he appeared specially (p. 80) and by defendant's sworn answer (p. 57), but is absurd on its face. In New Jersey the practice is regulated by the rules of common law and the English

Court of Chancery (see Stipulation, p. 72). It is unnecessary to do more than cite a few cases in that State where a special appearance has been entered and the practice recognized :

Rigney vs. Rigney, MSS. in Chancery of N. J., 1887 ; cited in Rigney vs. Rigney, 53 Hun, 457 ; 127 N. Y., 408, 411, and Laing vs. Rigney, 160 U. S., 531.

Crowell vs. Bottsford, 1 C. E. Gr. (16 N. J. Eq.), 458, 462 ; citing 1 Dan. Ch. Pr., 593.

(2) Defendant seeks to establish the novel point that, where a general appearance is entered by a defendant to a petition, the prayer of which is separable into two or more parts, such general appearance operates only as an appearance to the first or preliminary part ; and that, after such general appearance and full litigation of the first part of the application, defendant can divest the Court of its jurisdiction to make a final decree by simply ceasing to be represented by counsel after the entry of the interlocutory order.

This is precisely what the defendant attempted to do in this case. A petition and order were served on him to show cause (1) why the decree of divorce should not be opened ; (2) why it should not be amended by awarding alimony ; and (3) why petitioner should not " have such other and further relief as may be equitable and just " (Record, pp. 12, 17). He appeared to oppose this petition (Record, pp. 76, 77), submitted affidavits denying the material facts alleged by petitioner, and his solicitor argued the matter at length (Record, pp. 79, 80, 43). His appearance was never limited or sought to be limited in any way (Record, pp. 79–81).

Manifestly, the first thing to be ascertained was whether the first branch of petitioner's prayer should be granted—whether the decree should be opened at all. So the Chancellor decided that testimony should

first be taken upon the counter-allegations material to this issue (p. 43). This was merely separating the inquiry into its normal divisions, and could not divest the Court of its jurisdiction over defendant.

The courts of New York have frequently recognized a similar practice. They have uniformly held that a decree of divorce and a subsequent order fixing alimony pursuant to a reservation in the decree are both parts of one action, no matter how many years may intervene; and that, jurisdiction having once attached in the cause, the Court can provide for alimony whenever it becomes necessary.

Forrest vs. Forrest, 25 N. Y., 501.
Galusha vs. Galusha, 138 N. Y., 272.
Hauscheld vs. Hauscheld, 33 App. Div., 296.

At no stage of the proceedings did defendant object to the jurisdiction of the Court, either in his affidavits, proofs, arguments or petition of appeal (Record, pp. 24–33, 38, 39, 40–42).

After the Chancellor's order, and months before it occurred to defendant to attempt to withdraw from the case, a notice was served on defendant's solicitor of a motion for a reference as to the amount of alimony, pursuant to the petition and order to show cause of February, 1896, and all subsequent proceedings (pp. 45, 46). The reference to a Master to report how much alimony should be allowed was made in pursuance of this notice, as appears by the recital therein "that the defendant, between the date of service of notice of this motion and argument thereof, appealed from the aforesaid order filed herein on the 28th day of October, 1896" (p. 47).

So that, even if the testimony of Mr. Potts were of a character to inspire confidence, his opinion that the Chancellor's interlocutory order of October 27th, 1896, was a final disposition of the plaintiff's petition, is not entitled to any weight. For the Chancellor's *judgment* was that, pursuant to defendant's appearance, it was

proper to go on with the reference; and, when that was completed, he was satisfied and adjudged "that a money judgment *in personam* should be rendered against" defendant (p. 52).

See Rigney vs. Rigney and Laing vs. Rigney, *infra*, especially 160 U. S., at pp. 543, 544.

All the orders and the decree in the New Jersey case show that it was regarded by the Court as being all one proceeding, and that the defendant was in court as to the whole of it under his general appearance (Record, pp. 46-48, 50-52, 54, 55). However novel and interesting defendant's contention may appear, this Court does not have to pass upon it, for it has already been decided by the Supreme Court of the United States in the last above-mentioned case.

(b) Where a court of equity has jurisdiction and entertains a case, it will ordinarily retain the case until the whole subject is disposed of.

Ostrander vs. Weber, 114 N. Y., 95, 102.
Taylor vs. Taylor, 43 N. Y., 578, 584.
Henderson vs. N. Y. Cent. R. R. Co., 78 N. Y., 423, 437–439.
Lynch vs. Met. El. R. R. Co., 129 N. Y., 274, 280.
Mad. Ave. Bapt. Church vs. Bapt. Ch. in Oliver St., 73 N. Y., 82, 95.

In the light of these cases Mr. Potts' opinion (pp. 99, 82) that the Chancellor ceased to have jurisdiction of defendant after the entry of the order opening the decree of divorce is of no weight whatever. It is, besides flatly contradicted by the testimony of Mr. Bruce, plaintiff's witness (pp. 75, 76). In addition, we have seen already that Mr. Potts' testimony is not in accord with the facts or the record. His testimony, reported in the last six lines of page 77, is contradicted by the date of Defendant's Exhibit 1 (p. 97), for the latter is dated March 22d, 1897, and Mr. Potts claims to have

seen plaintiff's counsel in October or November, 1896, and to have then told him that he "had nothing to do with any further proceedings in that case, except to appeal from" the order of October, 1896. This letter (Deft.'s Exhibit 1), is the only limitation by defendant on the authority of his solicitor that has ever been intimated (compare pp. 79, 80, 81, 95, 96).

Again, in his testimony reported in pages 80, 81, he evidently confuses the motion for a commission to take testimony in New York, made in September, 1897, with the motion for a reference to ascertain the amount of alimony almost a year earlier, in November, 1896.

(c) Where a State Court has obtained jurisdiction of the subject matter and of defendant's person, any error arising thereafter is an irregularity and can be taken advantage of only by way of motion or by appeal. Such irregularity cannot be used to impeach the judgment in an action brought in another State to enforce it.

Jones vs. Jones, 108 N. Y., 415, 426, 427, which case was in many respects like the present one.

The case of Rigney vs. Rigney, 53 Hun, 457; s. c., 127 N. Y., 408; s. c., *sub nom.*, Laing vs. Rigney, 160 U. S., 531, is exactly in point. There plaintiff and defendant were married and resided in New Jersey until January, 1883, when defendant abandoned her and thereafter resided in New York. She filed her bill in April, 1883, to obtain a divorce and alimony on the ground of adultery. Defendant appeared and answered, but the issue so joined was never tried.

In April, 1886, plaintiff filed a supplemental bill, alleging various acts of adultery since the commencement of the suit, and praying for the same relief.

Defendant being then out of the State, substituted service of process was effected, under the chancery rules, upon him. He failed to appear or plead, and his default was noted. The cause then proceeded *ex parte;* on June 13, 1887, a decree was entered whereby

it was found "that the said defendant has been guilty of the crime of adultery charged against him in the said bill of complaint and the supplemental bill thereto," and thereupon an absolute divorce was decreed with alimony and costs to be paid by defendant. Thereafter defendant married another woman.

On September 9, 1887, the solicitors who filed defendant's answer to the original bill served on the solicitor of complainant a notice of motion to strike from the decree the words "Bill of complaint and the," so that it would read: "The said defendant has been guilty of the crime of adultery charged against him in the said supplemental bill." No modification was asked for as to alimony, and the solicitors limited their appearance to the purposes of the motion only. Their motion was granted, the decree was so amended and re-enrolled at defendant's request.

Plaintiff sued in New York to enforce this decree, and on the trial defendant contended that, as he was never served with any subpœna on the supplemental bill, the Court of Chancery never obtained jurisdiction to render a judgment *in personam* against him. The Special Term so held and dismissed the complaint.

For a full statement of the facts in the case, see 127 N. Y., pages 409–411, 160 U. S., pages 532–535.

On appeal, the General Term reversed the Special Term, and held that, as the Court of Chancery obtained personal jurisdiction of defendant under the original bill and his appearance thereto, it had power to make final disposition of the cause, and that though the subsequent proceedings may have been irregular, "defendant must seek the appropriate relief in New Jersey" (see Opinion of Mr. Justice BARTLETT, 53 Hun, 457, 461, and of Mr. Justice DANIELS on p. 462).

The Court of Appeals reversed the General Term (127 N. Y., 408, 416), and plaintiff took the case to the Supreme Court of the United States, which reversed the Special Term and the Court of Appeals.

Laing vs. Rigney, 160 U. S., 531, 539, 542, 543.

This case is in many respects similar to the case at bar, except that there the plaintiff's position was much weaker. There a palpable irregularity was committed, almost a jurisdictional defect, while in this case no irregularity is even alleged. The following language of the Court is peculiarly significant as distinguishing between the presence or absence of jurisdiction *in limine*, and the presence or absence of certain powers under the practice and rules of the Court in question: "In the absence of any statutory direction on the subject and of any reported decision of the Supreme Court of that State, *we are justified in finding the law to be as declared in the very case in hand, where the Chancellor of the Chancery Court of New Jersey has entered a final decree based upon an original bill, the process under which was served upon the defendant within the State, and upon a supplemental bill, a copy of which with a rule to plead was served upon the defendant without the State. So long as this decree stands, it must be deemed to express the law of the State.* If the defendant deemed himself aggrieved thereby, his remedy was by an appeal" (160 U. S., p. 542). * * * "Even if, therefore, it was the opinion of Mr. Dickenson, the defendant's expert witness, that the Chancellor of New Jersey erred in thinking that jurisdiction over the defendant personally was conferred by the service on him within the State of a subpœna under the original bill, and by the service on him without the State of a copy of the supplemental bill and of a rule to plead, such opinion does not support the finding of the trial Court that, under the laws of the State of New Jersey, the decree sued on and offered in evidence was not binding upon the defendant personally. The opinion of the Chancellor differed from that of the witness, and, what is more important, his *judgment* was that, under the laws and practice of the State of New Jersey, the defendant was in his court, subject to its jurisdiction and bound by its decree" (pp. 543, 544).

See, also,

Nations vs. Johnson, 24 How. (U. S.), 195, 201.
Cornett vs. Williams, 20 Wall., 226, 249.
McNitt vs. Turner, 16 Wall., 366.
Kinnier vs. Kinnier, 45 N. Y., 535, 542.
Dunstan vs. Higgins, 138 N. Y., 70, 75.

But the proceedings in New Jersey in Lynde vs. Lynde were all regular and according to the usual course and practice of the Court of Chancery. It is proper to apply summarily by petition to amend or supplement a final decree in equity, without the necessity of again setting the cause down.

Daniel's Chancery Pleadings and Pr., p. 996.
Sixth American Edition, page 991, and cases cited.
Campbell vs. Gardner, 3 Stock. (N. J.), 423.
Lynde vs. Lynde, 54 N. J. Eq., 473; affirmed 55 N. J. Eq., 591.
Dorsheimer vs. Rorback, 24 N. J. Eq., 33.
Jarmon vs. Wiswall, 24 N. J. Eq., 68.

Defendant had actual notice of the application for the final decree. Under the rules of the Court, if he was dissatisfied with the decree as entered, he could have applied for a rehearing, which would have been allowed practically as a matter of course.

Rules 101, 102 and 143–146 of N. J. Court of Chancery.

Having proved that the Court in New Jersey had jurisdiction to render the decree for alimony, we now come to the question as to the enforcement of that decree dy action in New York.

FOURTH POINT.

The Constitution of the United States requires that full faith and credit be given to the decree of the New Jersey Court. As that Court had jurisdiction of the parties and of the subject matter, the courts of New York are bound to give to that decree the same binding force and effect in New York that it has in New Jersey.

U. S. Const., Art. IV.; U. S. R. S., § 905.
Dobson vs. Pearce, 12 N. Y., 156.
Fletcher vs. Ferrell, 9 Dana (Ky.), 372, s. c., 35 Am. Dec., 143.
Cheever vs. Wilson, 9 Wall., 108.
Barber vs. Barber, 21 How. (U. S.), 582, 590, 591.
Shield vs. Thomas, 18 How. (U. S.), 253, 263.
Nations vs. Johnson, 24 How. (U. S.), 195.

This is not an action for alimony as such; neither is it an action upon a decree of a sister State granting alimony alone. It is an action to enforce a decree which directs defendant to pay alimony to plaintiff, and grants to plaintiff full equitable relief for the enforcement of such payment. The decree directs defendant to give bond to plaintiff to secure the money payments, and, in default of such bond, provides for a Receiver of his property.

It is, therefore, urged that it is enforceable in the manner provided by the Special Term judgment (Record, pp. 63–65).

(a) It is proper to file a bill in equity to enforce in all its parts a chancery decree of a sister State.

The Constitution of the United States provides that "Full faith and credit shall be given in each State to the public acts, records and *judicial proceedings* of every other State."

Section 905 of the Revised Statutes provides that "*The records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken.*" It should be noted that full faith and credit is given not to judgments alone, but also to "*judicial proceedings*" of sister States. This fact seems to have been overlooked in the case of Bullock vs. Bullock, 52 N. J. Eq., 561, cited with approval in the opinion of the Appellate Division. This was a suit in New Jersey to enforce a New York decree of divorce, which decree ordered the defendant to *execute a mortgage on real estate in New Jersey* to secure the installments of alimony. The New Jersey Court of Errors and Appeals, by a vote of six to five, refused to compel the defendant to execute this mortgage. But it should be noted that of the six Judges two were "lay Judges," while but one of the five was a "lay Judge," the lawyers on the bench being equally divided, four to four. Moreover, the Judge who wrote the prevailing opinion bases his decision on the fact that the New York judgment attempts to affect *the title to lands in New Jersey.* He says at page 568: "But the effect of a foreign judgment or decree as to money in another state must differ from the effect of such a judgment and *decree as to lands in another State.*"

On the other hand, Judge VAN SYCKEL, in a very able dissenting opinion (pp. 572–575), argues very clearly and forcibly that not only *the decree for alimony itself, but also the equitable relief to secure the payment of said alimony, is entitled to full faith and credit, and should be enforced in a sister State* (see p. 574).

Fletcher vs. Ferrell, 9 Dana (Ky.), 372, is directly in point. In that case it appeared that, pending a suit in chancery in Tennessee, concerning the title to certain slaves, defendants bought from one N., a defendant in the Tennessee suit, certain of the slaves in question. N. had removed them to Kentucky pending the suit in

Tennessee in order to sell them to defendants Ferrell and others. The decree in Tennessee decided adversely to N. as to the title and possession of the slaves, and suit was brought in Kentucky in equity to enforce and carry into effect the Tennessee decree. The Kentucky Court regarded Ferrell and his co-defendants as purchasers *pendente lite*, saying (p. 377), that to give the Tennessee decree "conclusive effect upon parties and privies and not upon *pendente lite* purchasers would no more be giving it the same conclusive validity and effect in this State that it has in Tennessee, than if its validity and effect were allowed to operate upon parties only and not upon privies."

Again, at page 380: "We are also satisfied that a court of equity here may take jurisdiction of the cause * * * to carry out and enforce the decree in Tennessee. * * * Had the decree there been rendered in Kentucky, it is abundantly established that an original bill would lie to carry out and enforce it. Nor can it be questioned than an original bill in equity would lie in Tennessee to carry out and enforce the decree in case the slaves were within the jurisdiction and subject to the control of the Court there. *Giving to the Tennessee decree the same force and conclusive effect of a decree in Kentucky, or that full faith and conclusive effect that would be given to it there, we can perceive no just reason for witholding the same remedy here to enforce it.*"

This reasoning is applicable to the case at bar. Unquestionably, a bill would lie in New Jersey to carry the decree and order sued on into effect, if defendant's person and property were now within the territorial jurisdiction of the courts there (Aspinwall vs. Aspinwall, 53 N. J. Eq., 684). *To grant to the plaintiff a money judgment for the total amount due to date under the New Jersey decree, without giving her security for the future, would not be giving to that decree the same effect as it has by the law of New Jersey.*

The case of Barber vs. Barber, 21 How., U. S., 582, is controlling in the case at bar. There the facts were that the wife had obtained a valid decree for divorce and alimony in the Court of Chancery in New York, with further equitable relief similar to that in this case. The husband left New York for Wisconsin. The wife, unable to collect her alimony in New York, sued him in the U. S. District Court in Wisconsin. She attempted first to sue on the law side of the Court, but her case was thrown out on demurrer on the ground that her proper remedy was in chancery (p. 586). She was successful on the chancery side.

WAYNE, J., in delivering the opinion of the Court says, at page 584: "Our first remark is—and we wish it to be remembered—that this is not a suit asking the Court for the allowance of alimony. That has been done by a court of competent jurisdiction. The Court in Wisconsin was asked to interfere to prevent that decree from being defeated by fraud" (defendant having escaped the New York Court's jurisdiction).

Later, after showing that the parties to a cause for divorce are bound by a decree for divorce and alimony, given by a State Court having jurisdiction, he says: "*Such a judgment or decree entered in any State of the United States, the court having jurisdiction, will be carried into judgment in any other State, to have there the same binding force that it has in the State in which it was originally given.* For such a purpose both the equity courts of the United States, and the same courts of the States have jurisdiction" (p. 591).

It is undoubtedly within the ancient jurisdiction of courts of equity to interfere to compel the payment of alimony (p. 590), though it seems that this has been limited in England to the amount of alimony already due. The reason for this limitation, however, does not exist here. *An examination of the authorities cited by* WAYNE, J., *shows that it grows entirely out of the peculiar relative situation of the English Courts of Chancery and Ecclesiastical Courts. It is in no way*

applicable to the enforcement in equity in one of our States of the equity decree of a sister State. It merely refers to the granting of a writ by the Court of Chancery which the Ecclesiastical Court has no power to issue, and which must be marked for a sum certain, like our execution against property (Cooper's Eq. Pl., pp. 149, 150; 1 Ch. Ca., 115; 2 Ch. Ca., 145; 2 Vent., 345; 7 Ves., 171, 173; 14 Ves., 261).

Further on in the same case, at page 595, it is said that alimony is "*a judicial debt of record* against the husband, which may be enforced by execution or attachment against his person, issuing from the Court which gave the decree; and when that cannot be done on account of the husband having left or fled from that jurisdiction, * * * *the wife, by her next friend, may sue him, wherever he may be found or where he shall have acquired a new domicile, for the purpose of recovering the alimony due to her, or to carry the decree into a judgment there with the same effect that it has in the State in which the decree was given.*"

Shields vs. Thomas, 18 How., U. S., 253; Nations vs. Johnson, 24 How., U. S., 195, and Cheever vs. Wilson, 9 Wall., 108, also furnish striking instances where an equity decree of one State has been enforced in full in equity in another State or territory.

In the latter case an Indiana Court had decreed a divorce, and that for the support of the children the husband should have one-third of the rents and profits of certain real estate in the District of Columbia, which had been settled upon the wife as *cestui que trust* by a marriage settlement, *and directed her to execute an assignment of said one-third to her husband Cheever.* The property had already been leased by her and the trustee to the defendant Wilson, and an agreement made whereby he was to receive the rents, &c., until certain advances made by him (Wilson) to Mrs. Cheever should be repaid. Yet the U. S. Supreme Court held that the Indiana decree could be enforced against Wilson as well as against Cheever's divorced

wife, by bill in equity, he having had notice of Cheever's rights thereunder.

On page 121 the Court says: "*The decree rendered in Indiana, so far as it related to the real property in question, could have no extra-territorial effect; but, if valid, it bound personally those who were parties in the case, and could have been enforced in the situs rei, by the proper proceedings conducted there for that purpose* (Sutphen vs. Fowler, 9 Paige, 280; Massie vs. Watts, 6 Cranch, 148, 158; 3 Ves., 44; Swann vs. Fonnereau, 3 Ves., Jr., 44; Portarlington vs. Soulby, 3 Mylne & K., 104; Monroe vs. Douglas, 3 Sandf. Ch., 185; Shattuck vs. Cassidy, 3 Ed. Ch., 152; 1 Story Eq., Secs. 743, 744)."

(b) There is no decision which has refused the relief here asked for, in a suit upon a decree of a sister State for the payment of installments, with equitable relief providing means to enforce payment.

The case of Wood vs. Wood (Com. Pl., Special Term, 1894), 28 N. Y. Supp., 154, is clearly distinguishable. There the plaintiff sought to enforce a naked decree for alimony, obtained in France, by sequestration under Sec. 1772 of the Code. The French decree did not sequestrate defendant's property. It merely directed the payment of alimony. Besides, it was not the decree of a sister State, and therefore not entitled as of course to full faith and credit. Plaintiff in New York sought to invoke under the Code (Sec. 1772) the remedies of sequestration, &c. No appeal was addressed to the Supreme Court's power as a court of equity, and no ground for doing so appears to have existed. In his opinion, PRYOR, J., disapproves Barber vs. Barber, but seems to overlook the fact that the arguments in the dissenting opinion of DANIEL, J., have no bearing on a suit in a State Court. Furthermore, he distinctly intimates that if the case were "*qualified by an element of chancery jurisdiction*," he would grant the equitable relief asked.

In a proper case this can undoubtedly be done. *The Supreme Court is the successor of the old Court of Chancery, and as such may grant equitable relief independent of the Code.* This may be done even in the absence of any precedent (see opinion of LANDON, J., at page 120 of Record).

N. Y. Code of Civ. Proc., § 217.
N. Y. Const., 1846, Art. 6, Sec. 3; and Const., of 1894, Art. 6, Sec. 72.
Youngs vs. Carter, 10 Hun, 194, 197.
Sherman vs. Felt, 2 N. Y., 186; approved, 41 N. Y., 159, 162.

While there are many cases holding that an action at law is the proper remedy for the enforcement of a chancery decree for the payment of money, they none of them involve the precise point here raised, as we shall see below.

On the authority of Shields vs. Thomas (18 How. U. S., 253), Mrs. Lynde can, at her option, either bring actions at law for the installments as they severally fall due, or file a bill to enforce and carry into effect the New Jersey decree. *But why should she sue in equity, if only to get a money judgment for the amount already due?* She would then be compelled to bring suit for the very next installment unpaid, and for the next, and so on. An action of debt would do just as well.

In Post vs. Neafie, 3 Cai., 22, perhaps the leading case on the point, and Pennington vs. Gibson, 16 How., U. S., 65, it was held that an action of debt would lie to enforce a chancery decree of any of the States. This doctrine has been followed and approved in scores of cases since, and is now too well settled to discuss.

It should, however, be carefully borne in mind that in these cases, and in all those holding that a judgment for alimony is, in effect, a common law judgment (*e. g.*, Crane vs. Crane, 19 N. Y. Supp., 691; Dubois vs. Dubois, 6 Cow., 494; Springsteene vs. Gillett, 30 Hun,

260), the question whether such a decree could not, at plaintiff's option be enforced by bill in equity, was not raised at all. In each of those cases plaintiff sought only to obtain a money judgment for certain sums due and unpaid under the decree of a sister State, and the only question raised was: Is a chancery decree equally a debt of record with a judgment at law?

Indeed, in Pennington vs. Gibson, often loosely cited to the effect that in such cases an action of debt is the only proper remedy, DANIEL, J., distinctly indicates that, in certain cases, a bill in equity is the proper remedy, if it is desired to enforce the decree in full (16 How., U. S., 65, 77, 78).

FIFTH POINT.

The final New York judgment, so far as it modified the judgment of the Special Term, was erroneous. The Special Term judgment alone gives full faith and credit to the New Jersey decree.

In this connection it is proper to call the attention of this Court to the opinion of LANDON, J., of the New York Court of Appeals, printed at page 120 of the record.

(a) It was error to reduce the money judgment from $14,896.03 to $9,393.38.

The sum of $14,896.03, the amount fixed by the Special Term, was made up as follows (Record, pp. 58, 59, 63, 64):

Alimony and counsel fees due December 28th, 1897 (p. 52)	$8,840 00
Costs in New Jersey suit (p. 52)	136 07
Money judgment of December 28th, 1897	$8,976 07
Interest on $8,976.07 to date of Special Term decision	569 98
Amount New Jersey judgment with interest	$9,546 05
Alimony from December 28th, 1897, to date of Special Term judgment, with interest (p. 64)	4,538 60
	$14,084 65
Extra allowance (p. 64)	700 00
Costs of Special Term (p. 64)	111 38
Total	$14,896 03

Of these amounts the Appellate Division and Court of Appeals allowed only the following (p. 108):

Alimony, &c., due December 28, 1897	$8,840 00
Extra allowance on $8,840, @ 5%	442 00
Costs of Special Term	111 38
Total	$9,393 38

The Appellate Division and Court of Appeals cut out the New Jersey costs, $136.07; interest on the New Jersey judgment, $569.98; the alimony since December 28th, 1897, $4,538.60, and reduced the extra allowance from $700 to $442.

It was error to exclude the New Jersey costs. The allowance and amount of these costs are not in issue, being admitted by the pleadings (pp. 6, 7, 52, 56).

So, too, it was error to allow no interest on the amount of the New Jersey judgment from the date of its entry.

Knapp vs. Knapp, 59 Fed. Rep., 641.

Brisbane vs. Dobson, 50 Mo. App., 170.
Bullock vs. Bullock, 57 N. J. Law, 508.

And in this case the New Jersey decree expressly provides for interest at six per cent. (p. 52).

So that, even if alimony could be recovered only down to the date of the New Jersey decree, the correct amount should be $10,134.73, made up as follows:

Amount New Jersey decree with interest, as above set forth	$9,546 05
Extra allowance on $9,546.05, @ 5%	477 30
Special Term costs	111 38
	$10,134 73

But alimony can certainly be recovered at $80 a week from December 28, 1897, to May 26th, 1898, the date of beginning the action in New York. There are numerous decisions on this point.

See Knapp vs. Knapp, 59 Fed. Rep., 641.
Bullock vs. Bullock, 57 N. J. Law, 508.

On this theory the amount of the judgment should have been $11,918.89, made up as follows:

Amount of New Jersey judgment, with interest	$9,546 05
Alimony at $80 a week from Dec. 28, '97 to May 26th, '98	1,680 00
Interest on the several installments pursuant to N. J. decree	19 20
	$11,245 25
Extra allowance on $11,245.25, @ 5%	562 26
Costs of Special Term	111 38
	$11,918 89

On the theory of the Court of Appeals it would be necessary for Mrs. Lynde, every week or every month, to obtain from the New Jersey Court of Chancery an

adjudication that a certain amount of money is due and unpaid, and then sue on these adjudications in New York. This theory is absolutely at variance with Knapp vs. Knapp and Bullock vs. Bullock, supra.

But we contend that none of these theories is the correct one, and that *alimony should have been awarded down to January 17th, 1899, the date of the Special Term decision.*

It is well settled that a court of equity has power to bring its judgment down to date, and make it conform to the facts as they exist when the judgment is rendered. This is done continually in suits against the elevated railroad, where rental damages are awarded down to the date of the decision.

Lynch vs. Man. El. R. R. Co., 129 N. Y., 280.
Van Allen vs. N. Y. El. R. R. Co., 144 N. Y., 174.
Interlied vs. Whaley, 85 Hun, 63.
See, also, Kilbourne vs. Supervisors of Sullivan, 137 N. Y., 170, 178.

As it is not disputed that the above figures are correct, the money judgment should remain $14,896.03.

(b) The New York Courts erred in refusing to enforce the New Jersey decree by ordering the defendant to pay $80 a week alimony for the future. This the Special Term judgment did.

From the discussion under the Fourth Point it is clear that unless the New York Courts enforce this provision as to future alimony, they are not giving to the New Jersey decree the same force and effect which it has in New Jersey. *If the defendant were in New Jersey, he would be compelled to pay this alimony at the end of each week, and that without any further action on the part of the plaintiff. The award of $80 a week for the future is as much an integral part of the New Jersey decree as is the award of $8,976.07 for back alimony and costs.*

See Dissenting Opinion in Bullock vs. Bullock, 52 N. J. Eq., p. 575.

The learned Appellate Division and Court of Appeals seem to neglect this question altogether. They give no reasons for the conclusion which they reach. They certainly cannot have intended to dispose of this point by the discussion of the distinction between the judgment and the means for its enforcement (Record, pp. 104–106).

Neither does the opinion in Wood vs. Wood, 7 Misc., 579, cited with approval by the Appellate Division (Record, p. 104), give any reasoning in support of the conclusion that the judgment for back alimony alone can be enforced in a sister State.

If the law as laid down by the Appellate Division and Court of Appeals is correct, then the plaintiff, at the end of every week, must begin a new action for the $80 alimony which has accrued during that week, although every question in said actions has been decided in her favor. The defendant can delay and harass her in every possible way, just as he has done in the present action. A judgment such as that rendered by the Special Term is the only method of preventing this and of protecting Mrs. Lynde.

It is not the purpose in decreeing alimony to a wife to give to her a weekly or monthly series of lawsuits, but to provide means to compel the delinquent husband to support her. A court of law cannot fully enforce these rights.

> Pennington vs. Gibson, 16 How. (U. S.), 65, 78.
>
> Thompson vs. Thompson, 52 Hun, 456.
>
> Wetmore vs. Wetmore, 149 N. Y., 520, pp. 528-530; reported below in 79 Hun, 268, 275.

In the latter case the wife had obtained a divorce, and the decree provided that the husband should pay her $3,000 a year as alimony, with additional sums for maintenance of their children, and should give bond in $50,000 as security. In order to prevent the enforcement of the decree, he left the State. Failing to collect

any of the sums due her, plaintiff exhausted all the statutory remedies of sequestration, &c., without effect. She thereupon brought an action to reach and subject to the payment of her alimony the income of a trust fund of which her husband was the beneficiary. The Court directed payment, not only of arrears, but also of the future alimony, out of said fund and the future income thereof.

The Court in Wetmore vs. Wetmore founded its relief, not only on the judgment for alimony, but on the natural duty of the husband to support the wife, from which he was not relieved by the decree of divorce.

(c) The Appellate Division and Court of Appeals erred in refusing to grant the equitable relief granted by the New Jersey decree and the Special Term judgment for enforcing the payment of alimony.

Security by bond, injunction and a receivership is as much a right of plaintiff, vested in her by the record, as are the money payments. To enforce the latter without the former would not be giving to the New Jersey decree the same effect that it has in New Jersey by the law and usage of the Courts there. *Under the New Jersey decree she has a vested right, not only to payment from time to time, but to ample security therefor, other than the personal property of a hostile defendant.* Unless this Court lends its equity powers to enforce this part of the decree, she will be so far unable to enforce her rights.

See Bullock vs. Bullock, 52 N. J. Eq., 575.

The New York Courts have fallen into error through confusing what is "judgment" and what is "execution or in aid of execution" (Record, pp. 105, 106); 41 App. Div., 280, 286–288). On this point Mr. Justice BARTLETT, after discussing Barber vs. Barber, quotes from the opinion in McElmoyle vs. Cohen (13 Pet., 312, 324, 325), concluding that, under the Constitution, "judgments, out of the State in which they are rendered, are

only evidence in a sister State that the *subject matter* of the suit has become a debt of record, which cannot be avoided but by the plea of *nul tiel record*" (see 41 App. Div., p. 287).

Now, granting every proposition leading up to this conclusion, it all amounts only to an additional argument for enforcing in full a decree in equity of a sister State. *In equity, the "subject matter" is not only the money damage which has become "a debt of record," but also the equitable relief; and the latter in turn is a matter of record, conclusive upon defendant.* Therefore, the like relief must be granted in the second State if its laws permit.

Further on (p. 288), the learned Justice who wrote the opinion of the Appellate Division quotes with approval from Bullock vs. Bullock (52 N. J. Eq., 561): "*That only is judgment that is pronounced between the parties to the action upon the matters submitted to the Court for decision.*" We have already seen (Point Fourth) that this line of argument is misleading, because it is not to *judgments* alone of sister States that the Constitution guarantees full faith and credit, but to their "*acts, records and judicial proceedings.*" But even taking the sentence last above quoted as correctly stating the law, it does not justify what follows (see Bullock vs. Bullock, 52 N. J. Eq., 561, 570, 571; Lynde vs. Lynde, 41 App. Div., 280 288). *In the present case "the matters submitted to the Court for decision" in New Jersey included: (1) "Shall plaintiff have alimony and how much?" and (2) "Shall she have further equitable relief for its enforcement (Record, pp. 12, 17)?" Both questions were decided in her favor and incorporated in the decree* (Record, pp. 52, 53). That decree is conclusive as to both questions. There is no less obligation to enforce in New York the New Jersey Court's direction as to the second than as to the first. In order to give full faith and credit to the New Jersey decree, our Courts are bound to enforce its provisions as to equitable

relief fully, so far as our laws may permit. This is the rule and the limitation (McElmoyle vs. Cohen, 13 Pet., 312, 324, 325). In other words, the New York Courts are not bound to grant any relief unknown to their law in enforcing a decree of a sister State. For instance, if the New York Supreme Court had not general equity jurisdiction; if its power to grant equitable relief was limited by statute to certain specified cases, then, unless some statute expressly authorized it to issue injunctions or appoint Receivers to enforce a sister State's decree, it could not give this plaintiff the relief asked for. But the Supreme Court *has* general equity jurisdiction, and its power as defined in Section 217 of the Code is ample for the case in hand. The New York laws do permit the enforcement of this New Jersey decree in the manner asked.

That being so, the first section of Article IV. of the U. S. Constitution is imperative. If the State Court has the power, it *must* exercise it.

The opinion of VAN SYCKEL, J., in Bullock vs. Bullock (52 N. J. Eq., 561, 572–577), contains a very clear statement of the principles applicable to this case. That case, we have seen, was decided by one vote and that the vote of a layman, the lawyers on the bench being equally divided. Judge VAN SYCKEL, in his minority opinion, says, at page 574: "*The decree or judgment in New York has the effect of being not merely prima facie evidence, but conclusive proof, of the rights thereby adjudicated, and a refusal to give it the force and effect in this respect which it had in the State in which it was rendered denies a right secured by fundamental law.*"

Again, at page 575: "The New York judgment is conclusive * * *

"FIRST. As to the right to a divorce.

"SECOND. As to the right of the wife to the alimony allowed.

"THIRD. *It is equally conclusive as against the husband, as to her right to have such alimony secured,*

* * * *that being expressly a part of the adjudication in New York.*"

"*The judgment imposed an obligation upon the husband from which he cannot relieve himself by removing from the jurisdiction in which it was rendered. That obligation follows him into this State.*"

He "*has had his day in Court in New York, where all these questions have been adjudicated against him, and our courts should hold that he is thereby concluded.*"

It is hard to see any flaw in this reasoning. The majority of the Court seems to have decided adversely on the ground that to do otherwise would give extra-territorial effect upon New Jersey real estate to the New York judgment. That point is not involved here.

The Appellate Division and Court of Appeals seem to have thought that plaintiff asks for sequestration and a receiver of defendant's property under Section 1772 of the Code of Civil Procedure (Record, p. 104; 41 App. Div., 286) and cite Walker vs. Walker (155 N. Y., 77), to the effect that the New York courts "have no jurisdiction over the subject of divorce except as they derive it from statute." Nobody will deny this, nor that Section 1772 of the Code refers only to domestic divorces. *But this is not an action for divorce. It is not an action for alimony. It is not an action under the Code of Civil Procedure. It is an action in equity, independent of the Code.* Plaintiff's prayer for relief is addressed to the Court as the successor of the Chancellor, possessed of general equity powers which have not been taken away by the Code (see opinion of LANDON, J., Record, p. 120).

See, also, Wetmore vs. Wetmore, 149 N. Y., 520, 528, where the Court says:

"The Constitution gives to the Supreme Court general jurisdiction in law and equity. As a court of equity it is invested with the power and jurisdiction

exercised by the ancient Court of Chancery in England, with the exceptions, additions and limitations created and imposed by the Constitution and laws of this State (2 R. S., 173, § 36).

"*The code contains statutory provisions with reference to the collection and enforcement of judgments awarding alimony. It, however, contains no provision attempting to limit or curtail the powers of the court of equity. It is the province of that Court to interpose when the law fails to afford an adequate remedy* (N. T. Bank vs. Wetmore, 124 N. Y., 241)."

In that case the Court went further in granting equitable relief than it is asked to do in the present case. There, as here, the plaintiff had exhausted her statutory remedies in the attempt to collect her judgment for alimony. The fact that in this case this was done in New Jersey, rather than in New York, should make no difference. New York's courts must give that judgment the same force and effect as it has in New Jersey if the New York laws permit.

Indeed, in the present action the Court below might properly have granted the equitable relief asked, even if no power were given to it by the Code to grant the same relief in a domestic action for divorce and alimony.

Black on Judgments, Sec. 859.
Stewart vs. Stewart, 27 West Va., 167, 175.
Oceanic Steam Nav. Co. vs. Compania Trans. Espanola, 29 Abb. N. C., 238.
Teel vs. Yost, 128 N. Y., 387.

Much more, should the relief be granted, when, as here, the Court is not asked to enforce any relief repugnant to its practice, but only to carry into effect the provisions of a decree which are similar to what the New York Courts would have granted in a similar case.

Code Civ. Proc., Sec. 1772.
Carey vs. Carey, 2 Daly, 424.

Effect is given almost daily to decrees of sister States appointing receivers and granting injunctions in the appointment of ancillary receivers of foreign corporations. The application in these cases merely shows the appointment of the receiver and the granting of an injunction in the State where the corporation is domiciled, and the New York Courts give the same relief as a matter of course. As Judge VAN BRUNT says in Woerishoffer vs. North River Construction Co., 6 Civ. Pro. Rep., at page 116 : " *In such a case the necessity for, and the right to, a receiver have been adjudicated upon by the Courts of the State where the corporation is domiciled.*"

See also Williams vs. Hintermeister, 26 Fed. Rep., 889, *where a New York injunction was enforced by action in Pennsylvania*, defendant having left New York for Pennsylvania after being served with the order.

So the New York Courts enforce specific performance of a contract to convey lands in a sister State. The decree does not create a lien on the land, but binds the defendant personally.

Gardner vs. Ogden, 22 N. Y., 327.

Much more then should a decree of one State, which is a contract of the most solemn nature, be specifically enforced by the decree of a sister State.

Furthermore, we contend that even if the learned Special Term Justice *were not bound* to grant the equitable relief provided by the New Jersey decree, *still in his discretion he had power to do so. His discretionary action in so doing should not be disturbed, since all the facts of this case show conclusively that in no other way can Mrs. Lynde's rights be protected, and she be saved the delays and annoyances to which the actions of the defendant have so long subjected her.*

SIXTH POINT.

That portion of the judgment of the Court of Appeals which modified the judgment of the Special Term, and the judgment rendered thereon by the New York Supreme Court, should be reversed, and the judgment of the Special Term should be affirmed, with costs.

Respectfully submitted,

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